

**MEMORANDUM OF UNDERSTANDING  
TO ESTABLISH AN IDAHO  
AQUATIC RESOURCE MITIGATION PROGRAM  
FOR IDAHO TRANSPORTATION DEPARTMENT PROJECTS**

This Memorandum of Understanding (MOU) establishes an umbrella in-lieu-fee (ILF) mitigation agreement between the Idaho Fish and Wildlife Foundation (FOUNDATION), the Idaho Transportation Department (ITD), the U.S. Army Corps of Engineers (USACE), the U.S. Department of Transportation Federal Highway Administration (FHWA), the Environmental Protection Agency (EPA), Idaho Department of Environmental Quality (DEQ), and the Idaho Department of Fish and Game (IDFG). The MOU establishes a mechanism to compensate for losses or impacts to wetland and stream resources (aquatic resources) throughout Idaho and establishes the framework for the creation of an Idaho Aquatic Resources Compensation Trust Fund (the “Fund”), as described below. The purpose of the Fund is to establish a non-exclusive mechanism to mitigate for losses of aquatic resources caused by selected ITD projects. This MOU is prepared in accordance with the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act 65 Fed. Reg.66, 914-917 (Nov. 7, 2000). The FOUNDATION, IDFG, USACE, FHWA, EPA, DEQ, and ITD agree to follow the procedures set forth below.

**I. Purpose**

This MOU creates the Fund as an additional mechanism for providing aquatic resources compensation for selected Section 404 Clean Water Act activities regulated by the USACE and actions affecting other wetland resources protected by Executive Order 11990, “Protection of Wetlands” as required by the Federal Highway Administration (FHWA). The goal of the Fund is to provide ITD more flexibility in meeting their aquatic resource mitigation requirements, while creating a financial source to restore, enhance, and preserve wetland ecosystems in Idaho. The Fund will be used to mitigate for general and individual permit actions as set forth in the Code of Federal Regulations (33 CFR Part 323) and for actions affecting wetland resources protected by Executive Order 11990. The Fund may be used for compensatory mitigation only after relevant permit actions have complied with USACE regulations, including the policy regarding aquatic resources impact avoidance and minimization and the EPA Section 404(b)(1) guidelines.

**II. Program Operation**

The Fund will be used to compensate for impacts to aquatic resources. Under Executive Order 11990, Federal agencies, including FHWA, are required to avoid new construction in wetlands unless the agency makes a determination that 1) there is no practicable alternative to such construction, and 2) the proposed action includes all practicable measures to minimize harm to aquatic resources which may result from such use. FHWA makes wetland findings documenting

these conditions for various project actions. The USACE issues Section 404 permits for certain activities that affect aquatic resources under their jurisdiction. Permit actions selected by the USACE or activities approved by the FHWA will be designed to avoid and minimize aquatic resources impacts to the maximum extent practicable and will seek the least environmentally damaging practicable alternative. The Fund will be used in accordance with USACE guidance. FOUNDATION, pursuant to the terms of this MOU, may at FOUNDATION'S sole and absolute discretion, act as a passive recipient of the compensation payments, which are required of ITD by the USACE or FHWA. FOUNDATION will play no role in the USACE decision to approve or deny a permit, the FHWA decision to approve or deny an activity, or the decision by USACE or FHWA as to whether and how much or what type of compensation is a necessary condition of any approval or permit action. Once compensation payments are placed in the Fund, FOUNDATION in cooperation with IDFG will submit proposals for the expenditure of the Fund to an interagency review team (IRT) (the "IRT"), as described in Section V below. The IRT will review specific proposals for restoration, creation, enhancement, maintenance, or preservation based on site suitability, maximum return on expended funds, and level of threat to those aquatic resources subject to the proposal. The FOUNDATION and all its actions will operate independent from the USACE's regulatory oversight except as specified in this MOU.

### **III. Scope**

The Fund can only be used to acquire, restore, create, enhance, maintain, and preserve aquatic resources in Idaho. Funds shall be used solely for activities directly related to physical aquatic habitat and resource establishment which includes, but is not limited to, the following: land acquisition, purchase of permanent easements, purchase of water rights, in-stream flow leasing, development of mitigation and monitoring plans, permit fees, implementation of physical mitigation and monitoring, administrative costs, and operation and management of mitigation parcels in perpetuity.

### **IV. Site Selection**

A. FOUNDATION will consult with the IDFG (e.g. Wildlife Habitat staff, Conservation Data Center staff), Natural Resources Conservation Service (NRCS), USACE and others knowledgeable in the field to identify potential aquatic resources compensation sites. FOUNDATION in cooperation with IDFG will then submit compensation proposals to the IRT. ITD and FOUNDATION will jointly maintain a running total of impacted aquatic resource acres, by type, watershed, functional units and value for which use of the Fund has been selected for compensation. FOUNDATION may use funds accepted from a number of small permitted projects collectively so as to maximize the size of sites available for compensation activities. Proposed compensation will involve proven and reliable techniques. A primary goal of the Fund is to ensure that, on average, the aquatic resources restored, created, enhanced, maintained, and preserved shall produce a level at least equal in functional units and acres of aquatic resources compared to those impacted by ITD projects.

B. FOUNDATION will provide to the IRT site specific project proposals that address the following elements:

1. Site locations of aquatic resources proposed for restoration, creation, enhancement, or preservation; baseline conditions at the sites; description of the kind of aquatic resource compensation to be provided (e.g., aquatic resource type, restoration or other activity, proposed timeline, etc.); and description of construction activities, re-vegetation, and other project components;
2. Schedule for conducting the activities that will provide compensatory mitigation;
3. Performance standards for determining ecological success of compensation sites;
4. Reporting protocols and monitoring plans;
5. Financial, technical, and legal provisions for remedial actions and responsibilities;
6. Financial, technical, and legal provisions for management and maintenance in perpetuity (e.g., trusts);
7. Qualifications of any project sponsors other than FOUNDATION and proposed allocation of overhead payments provided for in Section X below; and
8. Description of all local, state, and federal permits and approvals required for the compensation project and acknowledgement that project sponsors are required to secure all permits and approvals.

C. In general, projects that restore, create, or significantly enhance aquatic resources are preferred over aquatic resource preservation, though preservation of some aquatic resource acres is often associated with these projects. The IRT will review project proposals that are predominantly for the preservation of aquatic resources if the project includes a high ratio of preserved aquatic resource acres compared to acres impacted by the permitted projects. The IRT shall consider the functional values and threat of degradation of those aquatic resources proposed for preservation in conjunction with those aquatic resources impacted. In addition, compensation credit may be given when existing aquatic resources or other aquatic resources are preserved in conjunction with restoration, creation, or enhancement activities and preservation is demonstrated to augment the functions of the restored, created or enhanced aquatic resource. The Montana Wetland Assessment Methodology will be utilized for assessment of functions and values. FOUNDATION will provide at least annual monitoring reports to the IRT unless the IRT specifies a different reporting period. Such monitoring reports will estimate the acres and functions and values of aquatic resources restored, created, enhanced, and preserved through use of the Fund as well as the running total of impacted aquatic resources as required in Section IV.A.

D. It is anticipated that the majority of compensation projects approved under this MOU will be preserved through fee title acquisition, or establishment of conservation easements. In the case of conservation easements, the “prohibited uses” section should effectively restrict harmful activities (such as incompatible uses) that might jeopardize the purpose of the compensatory mitigation. FOUNDATION shall hold title to property interests in a manner consistent with

FOUNDATION’S mission, as determined in FOUNDATION’S sole discretion. FOUNDATION will be contractually obligated to carry out the activities set forth in approved project proposals.

E. FOUNDATION will attempt to develop projects using the Fund that are regionally distributed in correlation with the ITD permitted projects, the impacts for which are being mitigated. Priority projects near or in the watershed being impacted will receive preference. Though regional equity is the long-term goal, on a case-by-case basis the IRT may approve projects with high aquatic resource values wherever they occur.

#### **V. Interagency Review Team**

A. Funds will be disbursed for projects only after consultation with the IRT. The IRT shall consist of one representative each from IDFG, FHWA, Idaho Department of Environmental Quality (DEQ), EPA, and USACE. A representative of the National Marine Fisheries will act as a technical advisor to the IRT. FOUNDATION will distribute a project summary to IRT members. State and Federal Agencies and Tribes will be sent an agenda prior to the review team meeting for their information. On a case by case basis, interested parties will be invited to participate.

B. All IRT determinations, requests, and decisions provided for by this MOU will be made by consensus. The IRT shall approve, disapprove, or request more information within sixty (60) days of FOUNDATION submitting the written proposal.

C. FOUNDATION will request IRT approval for amendments to approved projects (“Amendments”) if the project exceeds the proposed project budget by more than five percent (5%) or if the project design or products vary significantly from what the IRT approved. The IRT will follow the procedures outlined above for reviewing Amendments.

D. The IRT shall meet at least annually to evaluate project proposals, program effectiveness, FOUNDATION’S accounting reports, and other issues related to the Fund.

E. The IRT will ensure projects supported by the Fund adequately compensate for the impacts for which ITD made contributions to the Fund. The parties to this MOU recognize that the timing, scope, and cost per acre of aquatic resources compensation may vary significantly from project-to-project. Further, the parties acknowledge that some projects may not fully achieve their anticipated benefits. Therefore, the success of this MOU will be measured on a programmatic rather than project-by-project basis. The IRT will compare the total compensation credits provided over time by all projects supported by the Fund to the total impacts for which ITD made contributions to the Fund. Key measures of success will include whether: total expenditures on approved projects provide compensation credits at or above the rate established by the fee schedule established pursuant to Section VII below, the aggregate credits of all projects supported by the Fund will ensure a minimum of one-for-one functional unit replacement, consistent with existing regulations and permit conditions. Compensation will be regionally distributed in correlation with the ITD permitted projects and completed projects will have self-sustaining hydrology and offer in-kind compensation where practicable. In the event

that the IRT determines that these measures of success have not been met and that monies remaining in the Fund are insufficient to make up the shortfall in compensation for aquatic resource losses, the IRT may require that FOUNDATION use credits from the pilot project provided for in Section VII.A. to provide additional compensation or undertake additional measures at existing sites to make them functional.

## **VI. Dispute Resolution Procedure**

A. During the development of any aquatic resource project proposal involving jurisdictional wetlands, if any agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency may request (after attempting to resolve the issue with the IRT), through written notification, that the issue be reviewed by the Corps District Engineer. Said notification will describe the issue in sufficient detail and provide recommendations for resolution. Copies of the notification will be sent to IRT members. Within 20 days, the District Engineer will consult with the notifying agency (ies) and will resolve the issue. The resolution will be forwarded to the other IRT members. The Foundation may also request the District Engineer review actions taken to develop the aquatic resource project if the sponsor believes that inadequate progress has been made by the IRT. If the dispute involves non-jurisdictional wetlands the reviewer will be the FHWA Division Administrator.

## **VII. Establishment of Fund and Fee Schedule**

A. ITD shall make an initial contribution to the Fund within sixty [60] days of the effective date of this MOU. This initial contribution will provide the funds needed to fund the implementation of the MOU and to develop a pilot aquatic resources project early in the implementation of this MOU and will include a 15% overhead fee.

Most ITD projects mitigated under this MOU will involve some temporal losses of aquatic resources. Temporal losses are those aquatic resource functions lost during the period between the onset of the impacting ITD activity until a wetland compensation project is approved, developed and begins functioning. It is usually necessary to compensate for temporal losses by construction of additional acres of wetlands above the number of acres actually impacted (increasing the ratio). However, under this MOU credits derived under the pilot project will be used to offset these temporal losses of aquatic resources.

It is anticipated that funding for the pilot project will allow the construction of wetlands in one or two geographic areas of the state. The number of functional units provided by the pilot project(s) is dependent on several variables including land acquisition costs and water rights availability. The Foundation anticipates that initial funding for the pilot program will provide from 15 to 50 acres of aquatic resources. The Foundation will work closely with ITD and the IRT to chose locations for the pilot project(s) that are geographically close to projected ITD construction projects.

The number of functional units provided by the pilot project and used to offset temporal losses for an ITD project can be re-used for future projects once an approved ILF aquatic resource

project has been completed.. The pilot aquatic resources project(s) and ITD in-lieu-fee projects undertaken during early implementation of the MOU may run concurrently. The pilot aquatic resources project(s) will be reviewed and approved by the IRT and ITD.

B. The FOUNDATION and IDFG will undertake a review of recently established Idaho wetland projects, to establish average per-acre costs for restoring, creating, enhancing, maintaining and preserving aquatic resources in different regions of the state. Projects implemented by private restoration firms, land management agencies, and conservation organizations will be reviewed. The per-acre costs will include reasonable costs associated with preparation of proposals and reports, project administration, planning, design, permitting, construction, selection and acquisition of land or easements, management, operations, maintenance, restoration, monitoring, stewardship activities, and contingencies in case of project failure. The review will be completed within six (6) months of the effective date of this MOU and will be accomplished using the fifteen percent (15%) overhead fee.

C. Following completion of this review, FOUNDATION, in consultation with the IRT, shall adopt a fee schedule establishing the amount of money that ITD will contribute to the Fund based on the type of aquatic resources impacted. FOUNDATION shall adopt a fee schedule no later than ten (10) months from the effective date of this MOU. The IRT may adjust the fee schedule to ensure that this MOU accomplishes its purpose.

D. Projects funded prior to adoption of the fee schedule will be credited to ITD based on the actual acreage and type of aquatic resources provided. The IRT shall determine which specific ITD projects will receive credit for compensation projects funded prior to the adoption of the fee schedule. Once the fee schedule is adopted, ITD will meet its compensation obligations by making contributions to the Fund in accordance with the fee schedule. Unexpended monies remaining in the Fund at the time the fee schedule is adopted shall be credited to ITD at the rate established by the fee schedule. After the full amount of the initial contribution has been allocated to specific ITD project impacts, ITD will make additional contributions to the Fund in accordance with the fee schedule and compensation ratios for new project impacts for which compensatory mitigation has been deemed appropriate by USACE (for aquatic resources under their jurisdiction) or FHWA. These contributions would be consistent with the funding of the project, which created impacts to be mitigated through this agreement. The IRT may determine that such additional contributions in accordance with the fee schedule may begin prior to full allocation of the initial contribution.

## **VIII. Compensation Payments**

ITD contributions to the Fund will be delivered to FOUNDATION by state warrant or Automated Clearing House (ACH) deposit, to be held in the Fund and used by FOUNDATION for acquisition, protection, management, and stewardship activities for the purpose of restoring, creating, maintaining, enhancing, and preserving aquatic resources in Idaho for compensation of ITD projects. FOUNDATION hereby agrees to receive and expend the Fund in a manner and

within the limitations described herein. FOUNDATION also reserves the right to refuse any payments to the Fund if those payments include unacceptable conditions on their use.

## **IX. Fund Accounting**

FOUNDATION shall hold and invest any payments collected pursuant to this MOU in an investment or banking institution so as to optimize income in accordance with the Idaho Reasonable Man Investment Act. FOUNDATION shall administer the Fund, in accordance with generally accepted accounting principles, and the account shall be subject to audit when requested by the IRT. FOUNDATION will provide the IRT with an account statement on an annual basis that states the balance of the Fund, principal, interest earned and expenditures. Interest earned by the Fund will remain with the Fund. A project may be broken into phases by FOUNDATION for purposes of Fund allocation. Monies left over from compensation projects will remain with the Fund.

## **X. Compensation**

A. FOUNDATION will be compensated for all direct expenses associated with IRT-approved projects, including preparation of project proposals. The FOUNDATION shall receive, at the time funds are deposited with the Fund, an overhead reimbursement equal to fifteen percent (15%) of the funds. The overhead reimbursement is to be used for day-to-day management of the ILF Program and for expenses incurred while carrying out the responsibilities of this MOU. FOUNDATION will provide the IRT with estimated project budgets and will track all direct expenses associated with each project. As long as project expenses are within five percent (5%) of budget, then no further IRT approval is needed for FOUNDATION to spend monies from the Fund. It is the intent of the parties to maximize the funds that can be applied directly to the restoration, creation, enhancement, or preservation of ecologically significant aquatic resources or buffers. In addition to fee title or conservation easement acquisition costs, funds under this MOU may be applied to costs for: (1) reasonable pre-acquisition expenses so long as the expenses apply directly to the project purpose, including but not limited to reasonable consultant fees, negotiations, appraisals, environmental hazard assessments, easement documentation, baseline reports, boundary and water rights surveys, title insurance, closing costs, and travel; and (2) preparation of proposals and reports, project administration, planning, design, permitting, construction, management, operations, maintenance, restoration, monitoring, and stewardship activities.

B. For on-going operation and maintenance costs on completed projects, FOUNDATION, where provided in an approved project plan, will receive from the Fund's earnings an overhead reimbursement equal to fifteen percent (15%) of all direct operational and maintenance expenses.

## **XI. Limits of Liability**

FOUNDATION shall have no obligation to use any non In-Lieu-Fee funds of the FOUNDATION to perform the terms of this agreement and no other non In-Lieu-Fee funds held by the FOUNDATION shall be subject to levy, execution, attachment, or any other form of encumbrance to perform the terms of this agreement. Nothing herein is intended to conflict with

signatory agencies' rules, regulations or orders . If the terms of this agreement are inconsistent with rules, regulations or orders of the agencies' entering into this agreement, then those portions of this agreement which are determined to be inconsistent shall be invalid. The remaining terms and conditions remain in full effect.

## **XII. Time Frame**

A. FOUNDATION agrees to allocate Fund monies to specific compensation projects at such time as there are adequate funds to meet all costs necessary to result in an environmentally meaningful project, as determined by FOUNDATION in its sole and absolute discretion, and upon approval of such expenditures in accordance with FOUNDATION'S policies and procedures and by the IRT. FOUNDATION will provide an accounting of the Fund demonstrating how monies were allocated on a project basis, as outlined above in Section VIII.

B. Monies deposited in the Fund for project acquisition and development is to be allocated to specific projects within two years of the date payments are received by FOUNDATION. "Allocated to specific projects" is defined as those projects that have been selected and approved by the IRT. If more than two (2) years passes from the date of the receipt of payments, the IRT must be notified. The IRT may then grant an extension, direct that the monies be delivered from the Fund to another organization/agency for compensation purposes, or be allocated to another project. It is the intent of the FOUNDATION that land acquisition, design, permitting, and construction will be completed and initial wetland function established within two years of project approval by the IRT. Loss of wetland values during the period of project identification, approval, and development (temporal losses) will be off set through the pilot project(s) described in Section VII A.

## **XIII. Mission and Qualifications of FOUNDATION and IDFG**

FOUNDATION is a non-profit corporation organized to receive, administer, and disburse funds for tax-exempt charitable, scientific, literary, and educational purposes. The FOUNDATION is a "qualified organization" within the provisions of Section 170(h) of the Internal Revenue Code of 1986, as amended, and is qualified under the laws of various states to acquire and hold conservation easements and meets the requirements of the Internal Revenue Code as a 501(c)(3) exempt organization. FOUNDATION'S mission is to protect and sustain Idaho's fishing, hunting, and wildlife heritage for present and future generations and to 1) promote conservation education about fishing, hunting, habitat, and wildlife management, 2) support projects dedicated to acquiring, preserving, and enhancing fish and wildlife habitat and 3) create unique opportunities to experience Idaho's fish and wildlife. This mission is met through land protection activities, demonstration projects, education, and cooperative projects with community-based organizations. Land protection may take the form of conservation easement acquisition or fee acquisition, conservation land management or restoration. IDFG is a state government organization whose mission is to "preserve, protect, manage, and perpetuate" Idaho's wildlife and to "provide for the citizens of this state and, as by law permitted to others, continued supplies of such wildlife for hunting, fishing, and trapping". IDFG manages over 370,000 acres of wildlife habitat and 31 wildlife management area including about 60,000 acres of wetlands



and associated uplands. IDFG also houses the Conservation Data Center, which includes a staff of zoologists and botanists with extensive experience in identification and monitoring both terrestrial and wetland plant and animal species. IDFG's Engineering Bureau has expertise in developing and rehabilitating wetlands through the development of dike systems and manipulation of water levels. FOUNDATION, in partnership with IDFG brings an extensive background in acquiring, developing, and managing wetland projects. FOUNDATION is a partner and trust manager in several ongoing mitigation programs including the I-15 Levee Wetland Mitigation Trust, the Upper Blackfoot River Basin Trust, and the I-86 Chubbuck Interchange to Pocatello Creek Interchange project. Foundation and IDFG collectively hold and manage 36 conservation easements ranging in size from less than 10 acres to over 16,000 acres.

#### **XIV. Good Faith**

The parties hereto agree that all will exercise their rights and obligations in good faith as contained in this MOU.

#### **XV. Effective Date, Amendment and Termination**

This MOU shall become effective on the date of its execution by the last party signing the document. This MOU may be amended or terminated by any party by giving one hundred and twenty (120) days written notice to the other parties. Amendments require written approval by all signatories. Within sixty (60) days of the issuance of a written notice of termination, the parties to this MOU shall meet to discuss the reasons for the notice and any actions that may address the concerns leading a party to seek termination of this MOU. Prior to termination, FOUNDATION shall provide an accounting of the Fund and shall complete payment on contracts for projects approved by the IRT and any expenses and obligations incurred on behalf of the Fund. IRT approved projects that are underway, but are incomplete at the time of termination, will be completed, as approved, unless FOUNDATION and the IRT agree in writing to terminate the projects. Monies remaining in the Fund at the time of termination will be delivered by FOUNDATION to another entity as directed by the IRT. All compensation obligations associated with such unused monies will be transferred with those monies. Upon termination, any credits remaining in the pilot project(s) will be transferred to ITD.

#### **XVI. Dispute Resolution**

As a condition precedent to a party bringing any legal action for breach of this MOU, a party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties to the dispute shall each pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this MOU.

#### **XVII. No Third Party Beneficiaries**

This MOU shall not, nor be deemed nor construed to, confer upon any person or entity, other than the Parties to this MOU, any right or interest, including, without limiting the generality of the foregoing, any third party beneficiary status or any right to enforce any provision of this MOU.

#### **XVIII. Force Majeure**

Nothing contained in this MOU shall be construed to impose upon the party any liability arising from causes beyond the Parties' control, including, without limitation, unauthorized actions by third parties, natural disasters such as fire, flood, storm, and earth movement, or from any prudent action taken in good faith by the Parties under emergency conditions to prevent, abate, or mitigate significant injury to protected property resulting from such causes.

#### **XIX. Execution**

This MOU has been duly executed as of the last date shown below.

Idaho Transportation Department      By: \_\_\_\_\_ Date: \_\_\_\_\_  
Dwight Bower  
Its: Director

Idaho Fish and Wildlife      By: \_\_\_\_\_ Date: \_\_\_\_\_  
Foundation      Gary Rose  
Its: President

Idaho Department of      By: \_\_\_\_\_ Date: \_\_\_\_\_  
Fish and Game      Steven M. Huffaker  
Its: Director

U.S. Army Corps of Engineers      By: \_\_\_\_\_ Date: \_\_\_\_\_  
Walla Walla District      Anthony J. Hofmann  
Its: Lieutenant Colonel, Corps of  
Engineers, District Engineer

Federal Highway Administration      By: \_\_\_\_\_ Date: \_\_\_\_\_  
Stephen A. Moreno

457  
458  
459  
460 Environmental Protection Agency By: \_\_\_\_\_ Date: \_\_\_\_\_  
461 James Wertz  
462 Its: Director, Idaho Operations Office  
463 US Environmental Protection Agency, Region 10  
464  
465 Idaho Department of Environmental By: \_\_\_\_\_ Date: \_\_\_\_\_  
466 Quality Toni Hardesty  
467 Its: Administrator  
468  
469  
470  
471  
472